United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

7-24-71

77-7210

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
JUL 29 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

THE SPRAGUE & RHODES COMMODITY CORP.,
Plaintiff,

—against—

S.S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,
Defendants, Third-Party Plaintiffs-Appellees,

—against—

PITTSTON STEVEDORING CORP.,
Third-Party Defendant-Appellant.

ON APPEAL BY THIRD-PARTY DEFENDANT FROM FINAL JUDGMENT IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT

BRIEF FOR, SS TORONTO, HER ENGINES, ETC., WILH WILHELMSEN, BARBER STEAMSHIP LINES, INC. AND BARBER LINES A/S, THIRD PARTY PLAINTIFFS-APPELLEES

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for S.S. Toronto, etc., Wilh Wilhelmsen, Barber Steamship Lines, Inc. and Barber Lines A/S

CHESTER D. HOOPER
VINCENT M. DEORCHIS
of Counsel

TABLE OF CONTENTS

PAGE

Statement of the Case 1

Statement of Facts 2

POINT I—

Even the "action or inaction" attributed to Barber by Pittston would not preclude Barber from relying upon the warranty of workmanlike service which Pittston owed to Barber 20

POINT II--

The District Court was correct in concluding that Barber's lawsuit with plaintiff was a claim encompassed within the release executed by Barber, in favor of Pittston, on November 13, 1972 25

CONCLUSION 31

TABLE OF AUTHORITIES

Cases:

Conceicao v. New Jersey Export Marine Carpenters, Inc., 508 F.2d 437 (2d Cir. 1974) 20, 24

Estate of Anton L. Trunck v. Commissioner of Internal Revenue, Docket No. 76-4125, slip opinion 1651 (2d Cir. February 2, 1977) 26, 27

PAGE

Henry v. A/S Ocean, 512 F.2d 401 (2d Cir. 1975) 20, 21-23
Hurdich v. Eastmount Shipping Corp., 503 F.2d 397 (2d Cir. 1974) 20, 23

McAllister v. United States, 348 U.S. 19 (1954) 24, 29

Rotberg v. Dodwell & Co., 152 F.2d 100 (2d Cir. 1945) 27, 29, 30

United States v. Lennox Metal Manufacturing Co., 225 F.2d 302 (2d Cir. 1955) 27, 28

Waterman Steamship Corp. v. David, 353 F.2d 660 (5th Cir. 1965), cert. denied, 384 U.S. 972 20
Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958) 20

Statute:

1972 Amendments to the Longshore and Harbor Worker's Act, 33 U.S.C. §901 21

Authority:

3 Corbin, Contracts 45 (1951) 28

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE SPRAGUE & RHODES COMMODITY CORP.,

Plaintiff,

—against—

S.S. TORONTO, her engines, etc., WILH WILHELMSEN and BARBER STEAMSHIP LINES, INC., and BARBER LINES A/S,

Defendants, Third-Party Plaintiffs-Appellees,

—against—

PITTSTON STEVEDORING CORP.,

Third-Party Defendant-Appellant.

ON APPEAL BY THIRD-PARTY DEFENDANT FROM FINAL JUDGMENT IN FAVOR OF DEFENDANTS, THIRD-PARTY PLAINTIFFS AGAINST THIRD-PARTY DEFENDANT

BRIEF FOR, SS TORONTO, HER ENGINES, ETC., WILH WILHELMSEN, BARBER STEAMSHIP LINES, INC. AND BARBER LINES A/S, THIRD PARTY PLAINTIFFS-APPELLEES

Statement of the Case

Plaintiff brought this admiralty cargo action to recover $45,000, as the value of 781 bags of coffee which were missing from a shipment of 2,099 bags of coffee carried from Assab, Ethiopia, to New York.

The cargo was carried aboard the m.s. TORONTO, which was owned and/or operated by Wilh Wilhelmsen, Barber Steamship Lines, Inc. and Barber Lines A/S. These defendants will hereinafter be referred to as Barber.

The cargo was discharged from the TORONTO, in New York, by Pittston Stevedoring Corp., hereinafter referred to as Pittston.

In addition to discharging the vessel, Pittston had contracted with Barber to store and deliver the TORONTO's cargo to various consignees, including plaintiff.

The district court correctly held that Barber delivered the cargo in suit to Pittston, but that Pittston failed to deliver 781 bags of the coffee cargo to plaintiff. The district court therefore directed that judgment be entered by plaintiff against Barber, and by Barber against Pittston. Barber's judgment against Pittston sounded in indemnity, and included attorneys' fees expended by Barber to defend plaintiff's complaint.

Statement of Facts

Apparently, Pittston does not dispute that Barber delivered the correct cargo to it. It now urges reversal on the theory that Barber prevented Pittston from properly delivering the cargo to plaintiff.

It also urges reversal on a theory that Barber had released Pittston from this lawsuit in a release signed November 13, 1972 (Exhibit 1, 227a-283a).*

---

* Numbers in parentheses refer to pages of the appendix.

Pittston's argument that action and inaction by Barber hindered and prevented Pittston from performing its work was correctly and succinctly disposed of by the district court as follows:

> Finally, Pittston's suggestion that Barber's failure to return to Pittston the misdelivered bags of Djimmas coffee is somehow fatal to the third-party claim over is mentioned if only to demonstrate that it has not been overlooked. Although this Court is mindful that third-party plaintiffs might be foreclosed from the indemnity they seek in the event of "conduct on [their] part sufficient to preclude recovery," *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958), Pittston has failed to demonstrate or, indeed, to argue convincingly, that any sins of omission or commission arguably attributable to Barber with respect to the Djimmas coffee either caused the loss—or prevented the recovery—of the Ghimbi coffee involved in this case.

(259a)

A brief examination of Pittston's "action and inaction" argument will not only show that the above holding was not clearly erroneous. It will also show that any other holding would have been clearly erroneous.

Pittston delivered the wrong coffee to plaintiff, on September 27 and 28, 1971 (605a, 606a). Shortly after Pittston made this mistake, plaintiff told Barber that it had received the wrong coffee. Barber then arranged to have the coffee delivered to a warehouse and ultimately, to its rightful owner (155a-157a).

Pittston claims that the failure of Barber to return the cargo to Pittston's pier, and/or to tell Pittston that Pittston had made a mistake, should preclude Barber from relying on the warranty of workmanlike service which Pittston owed Barber. Pittston makes this argument although the record shows that Barber did tell Pittston that Pittston had made a mistake.

Pittston speculates that, because Barber gave the wrongfully delivered coffee to its rightful owner without telling Pittston, Pittston gave the rightful owner of the coffee in suit, Carl Borchsenuis, a second shipment of coffee which did not belong to it.

Pittston did not mention three facts which are fatal to its theory. 1) A longshore strike, which closed Pittston's piers, prevented return of the wrongfully delivered coffee to Pittston (170a). Barber could only arrange to have it placed in a warehouse at that time. 2) Both Barber and plaintiff's surveyor advised Pittston of the shortage (167a, 101a-103a) and Pittston acknowledged that there had been a cross delivery before it delivered the "second shipment", 721 bags of coffee to Borchsenius (103a). 3) It was Pittston's, not Barber's, duty to correct the Delivery Book to reflect the cross delivery and thus to prevent additional mistakes (174a-175a).

One or two days before the longshore strike was to start on October 1, 1971, Barber learned that plaintiff had received the wrong coffee (156a). Plaintiff's trucking company told Barber's Mr. Herbert that a mistake had been made. Because the longshore strike was about to start and Pittston's piers were about to close, Mr. Herbert sug-

gested that the wrong coffee be returned to a warehouse for delivery to its rightful owner, Carl Borchsenius. Mr. Herbert's unrebutted testimony explained that the coffee importing community is a relatively small community, that Carl Borchsenius has a good reputation in the community and would not keep 700 bags of coffee which did not belong to it.

A. I remember an incident where Sprague & Rhodes ordered a Davies truck to pick up some coffee. After they picked it up they advised me they had the wrong marks or some of the wrong marks.

Q. Who advised you they had some of the wrong marks?

A. The trucking company.

Q. Do you remember what they told you at that time?

A. They said they wanted to return them to the pier. However, this was the day before or two days before the pier was due to go on strike.

Q. What did you do?

A. I suggested they put it in the warehouse, and then we could find out to whom it belonged, deliver it from the warehouse and mark the record accordingly.

Q. Did you find the rightful owner?

A. Carl Borchsenius.

Q. What did you do with this coffee, what was done with this coffee?

A. I called up a Mr. Danny Grunwald with that company and told him where the coffee was and he made arrangements to pick it up.

Q. How long had you been dealing with Mr. Daniel Grunwald?

A. Eighteen, twenty years.

Q. How long have you been dealing with Carl Borchsenius?

A. Same length of time.

Q. How many coffee buyers do you deal with?

A. Coffee buyers?

Q. People that import coffee into the United States.

A. Ten, twelve.

Q. Do you know the reputation of Carl Borchsenius within the community of coffee importers?

A. To the best of my knowledge, they are honest.

Q. If Carl Borchsenius was to receive an extra 700 something bags of coffee, what would you expect them to do?

A. I would expect them to call me up and say I got too much coffee.

Q. You wouldn't expect him just to keep it and say nothing?

A. No sir.

Q. Did you receive a claim from Carl Borchsenius before you gave them the correct coffee?

A. For a number of bags. I couldn't tell you how many at the moment.

(155a-157a)

Contrary to Pittston's arguments, it was not kept in the dark concerning the whereabouts of the coffee until the time of trial. Pittston was told of the cross delivery shortly after it occurred. Barber's Mr. Herbert testified as follows in response to Pittston's cross examination:

Q. Did you advise Pittston of the cross-delivery?

A. Yes.

Q. How?

A. By telephone.

Q. To whom?

A. I would have to say their office. I couldn't give you a name because the pier was closed.

(167a)

Not only did Barber's Mr. Herbert advise Pittston of the cross delivery by telephone, plaintiff's surveyor Mr. Iverson personally told Pittston's pier superintendent, on December 1, 1971, that plaintiff was claiming a large shortage. On December 13, 1971, Pittston's delivery clerk, Mr. Arnold Jackson, acknowledged that *a cross delivery had occurred and that some of plaintiff's coffee remained on the pier.* Pittston made the claimed "second delivery" to Borchsenius after this acknowledgement. Even if a second delivery to Borchsenius occurred, how can Pittston try to pass the blame to Barber when Pittston realized that plaintiff's, not Borchsenius', coffee remained on the pier.

Plaintiff's surveyor, Mr. Iverson explained the post-strike situation on Pittston's piers as follows:

Q. The next time you went back to the pier, was that December the 13th?

A. Yes.

Q. All right.

Now, whom did you speak to at the pier then?

A. I spoke with, again, the delivery clerk, the Pier superintendent, and the location man.

Q. The pier superintendent was Mr. Arnold Johnson?

A. Mr. Johnson, right.

Q. What did you say to him and what did he say to you with respect to the Gimbi coffee?

A. *He acknowledged the fact that there was a cross delivery and also advised that there were Gimbi marks on the pier.*

Although they did show almost complete delivery, there were bags of my marks still on the pier available for delivery.

(102a-103a) (emphasis added)

Mr. Iverson's testimony stands unrebutted. How Pittston can claim that Barber was to blame for Pittston not locating plaintiff's cargo is not understood. At page 13 of its brief, Pittston somehow implies that it delivered 969 extra bags of coffee to Borchsenius because Barber corrected Pittston's mistake and returned Borchsenius' coffee to Borchsenius. Pittston tried to switch the blame for the second mistake, which it speculates it made, to Barber, on the theory that it delivered a consignment of coffee to Borchsenius when it did not know that Barber had already delivered the coffee to Borchsenius.

This theory fails when the above, unrebutted testimony of Mr. Iverson is considered and when Pittston's record of the deliveries it made to Borchsenius (607a) is examined.

Pittston acknowledged, on December 13, 1971, that it had made a cross delivery and that some of the correct coffee remained on the pier. Yet, an examination of Pittston's record of delivery to Borchsenius (607a) discloses that Pittston delivered 421 bags of coffee to Borchsenius *after December 13, 1971.* Obviously, Pittston should not have delivered plaintiff's coffee to Borchsenius after it knew of the cross delivery. It should have reflected the

cross delivery in its Delivery Book, and asked plaintiff where the wrongfully delivered coffee was.

Pittston's argument that Barber, not Pittston, was responsible for maintaining the delivery book amounts to an admission by Pittston of the delivery book's importance. This important record should have been maintained by Pittston, not Barber as Pittston now alleges. Pittston, at page 8 of its brief, quoted a portion of Captain Wheeler's testimony and implied that Barber should have maintained the delivery book. A more complete quote of Captain Wheeler's testimony shows that Pittston, not Barber, should have corrected the delivery book.

Captain Wheeler's Testimony as quoted in Pittston's Brief

A. Yes, sir. The cross-delivery would have to be

A more complete quote of Captain Wheeler's Testimony on the subject of the Delivery Book

Q. Assume that coffee was discharged from the pier by the stevedore to the wrong consignee, the stevedore delivery book indicated that the coffee went out of the pier to the consignee and later the stevedore was told that it delivered the wrong coffee.

Would you expect the stevedore to make any entry in the delivery book concerning that cross-delivery?

A. Yes, sir. The cross-delivery would have to be

Captain Wheeler's Testimony as quoted in Pittston's Brief

corrected. There are two elements of a cross-delivery. They would have to be reconciled, recrossed and the customs would have to be notified, customs on the pier, and there would be quite a lot of —quite a few records would have to be reconciled or corrected.

Q. In other words, the stevedore would have to find out what happened and change his book to indicate that?

A. Yes. The cross has to be traced down and corrected or if it is the same commodity within the mutual consent of the consignees, if it is equal—like bags of coffee, they frequently will keep it, the proper number. (174a)

A more complete quote of Captain Wheeler's Testimony on the subject of the Delivery Book

corrected. There are two elements of a cross-delivery. They would have to be reconciled, recrossed and the customs would have to be notified, customs on the pier, and there would be a lot of—quite a few records would have to be reconciled or corrected.

Q. In other words, the stevedore would have to find out what happened and change his book to indicate that?

A. Yes. The cross had to be traced down and corrected or if it is the same commodity within the mutual consent of the consignees, if it is equal—like bags of coffee, they frequently will keep it, the proper number. (174a-175a)

In fact, Captain Wheeler's testimony coincides with the treatise quoted at length on pages 5 and 6 of Pittston's brief.

That Treatise, Sauerhies, MARINE CARGO OPERATION (1956) explained that it was Pittston's responsibility both to prepare and maintain the delivery book.

Pittston, and only Pittston, was at fault for not delivering plaintiff's cargo to plaintiff. The district court correctly held that Pittston breached its warranty of workmanlike service and must idemnify Barber.

The district court also correctly held that any question concerning delivery of cargo to Borchsenius was not an issue in this case. We are here only concerned with the cargo destined for plaintiff, not the cargo destined to Borchsenius. Barber delivered the cargo to Pittston, and Pittston failed to deliver it to plaintiff. Therefore, the liability has been correctly assigned to Pittston.

Pittston also urges reversal of the district court's decision that Barber had not released Pittston from this law suit. This argument, by Pittston, was correctly and succinctly disposed of, as follows by the district court:

> Nor does this Court ignore Pittston's assertion that, under a familiar principle of contract construction, the release must be construed most strictly against the party that drafted it. Nevertheless, this Court concludes, the application of that rule to resolve ambiguities that remain after resort to extrinsic evidence has proved unavailing, see *Boswell* v. *Chapel,* 298 F.2d 502, 506 (10th Cir. 1961), and cases cited therein, is inappropriate here: *the evidence described above leaves the Court, unhappily for Pittston, with no doubt as to the intended meaning of the release.*

(263a-264a) (emphasis supplied)

The release, which was executed by Barber, in favor of Pittston on November 13, 1972, Exhibit 1 (277a-283a) only released certain listed *claims* and other *claims,* which Barber had, at that time, in its office. It did not release any *lawsuit,* certainly not the lawsuit now before the bar, which demanded $45,000, a sum almost equal to the total claim settlement represented by the release.

The parties to the release in question, Barber and Pittston, only intended to release certain cargo damage and loss *claims* settled between Barber and Pittston as well as any *claim* which Barber might have had in its, Barber's, office at the time the release was signed.

The release was the result of claim settlement negotiations between counsel for Barber, M. E. DeOrchis, and Ara A. Shimshidian, of Haight, Gardner, Poor & Havens; and Miss O'Keefe, the claims manager for Pittston. As Mr. DeOrchis testified at the trial, claims of this nature are usually handled, at the claims level, between non-lawyer, claims adjusters (215a-217a). It is only after the claims adjusters have been unable to dispose of a case that the case is sent to lawyers. After lawyers for both sides receive the case, a lawsuit usually is started. After the lawsuit is started, *and* after both sides refer the matter to lawyers, the matter is handled as a *lawsuit,* not a *claim.*

The matters dealt with in the release, Exhibit 1 (277a-283a) were *claims,* not *lawsuits.* However, they were handled by lawyers for Barber, not claims adjusters because of a somewhat unusual situation. Barber had terminated its contract with Pittston and was trying to settle many claims against Pittston in a short period of time. Barber had received, over a period of time, about 50 cargo

claims, for which it was forced to reimburse various cargo owners, and [illegible] which Barber realized Pittston was either wholly or partially liable.

Rather than attempt to deal with each claim at the claims adjuster level over a period of time, Barber decided to force the issue. Barber withheld monies it owed to Pittston until the claims could be resolved. Barber also sent its files for all 50 claims to Haight, Gardner for settlement as a large package.

Mr. DeOrchis and Mr. Shimshidian reviewed the files and met with Pittston's claims manager, Miss O'Keefe. After discussing each claim individually, a total settlement figure of $45,000 was reached (227a).

Mr. DeOrchis recommended the settlement to Barber. Barber agreed with the figure, but told Mr. DeOrchis that it, Barber, had found four additional claims in its office that had been overlooked (200a-201a, 208a).

Miss O'Keefe was informed of the additional claims and the total settlement figure was raised to $46,339.00 (208a, 277a-278a).

However, Miss O'Keefe did not want to deal with additional claims that might emerge from Barber's woodwork (201a).

Therefore Miss O'Keefe *initiated* the indented language on page two of the release (278a) and Barber agreed to it (225a). That language reads as follows:

> any damage or loss to the shipments of cargo included in the attached list, market "Exhibit A", and any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley &

Eager Klaveness, A.F. & Co., A/S up to November 13, 1972

At the time the release was signed, a lawsuit which had arisen from a fire at a pier at which the m.s. Fernfield was moored, was being litigated amongst several parties. Included in the parties were Barber and Pittston (218a).

Pittston made no attempt to argue that the release in question, exhibit 1 (227a-283a) released Pittston from that case. In fact, Pittston paid "... hundreds of thousands ..." dollars to settle the Fernfield case (219a).

It is obvious that the parties did not intend the release to apply to lawsuits. The Fernfield fire case was a lawsuit, not a cargo claim, on the day the release was signed, November 13, 1972 (218a). The release in question was not made an issue in the Fernfield and should not have been made an issue in the case now before the bar.

The district court correctly explained, in its opinion, why the release did not cover the matter in suit:

> It was the testimony of the two attorneys who had negotiated the settlement on Barber's behalf that both parties to the release had understood its terms to include only claims that had not risen—or declined—to the level of litigation, *i.e.* matters that were still pending in the Barber claims office files and had not yet been transferred to the office of counsel. The attorneys further testified that, to parties in the industry involved in such negotiations, *the distinction between a "cargo claim" and a claim that has become the subject of a lawsuit—as was the matter involved herein—is clear enough.* Pittston's own understanding that the

> term "cargo claim" did not extend to every matter involving a claim in the generic sense is evidenced by its failure to invoke the release as a defense in the "Fernfield Fire" case, a major claim involving both parties that was pending—in the courts—prior to November 13, 1972.

(262a-263a) (emphasis supplied)

The clear distinction between a cargo claim and a lawsuit, as treated by the maritime industry, is well explained by the following testimony given by Mr. DeOrchis:

> Q. We have had testimony this afternoon about cargo claims and cargo suits.
>
> Can you tell me the difference between them?
>
> A. Yes. The way the claims industry is set up in the maritime field, the different lines or their underwriters have claims departments. A line, if it is a very small line might not have its own claim department, and might rely entirely on a claim department of an underwriter. These are known as adjusting companies and they hire people known as claims adjusters.
>
> These claims adjusters handle huge amounts of small, run of the mill claims.
>
> Q. Stopping right there for a minute, are these claims adjusters lawyers?
>
> A. No, for the most part they are not lawyers. Very few. They do a service in the industry by getting rid of a lot of everyday claims that don't have to be litigated. Of course they try to avoid litigation.
>
> When the claims adjusters cannot get rid of a case or claim, then either one side or the other will notify his opponent, well, we can't settle this, we are going to send it to lawyers.

If it is sent out to lawyers for cargo people, then those lawyers will file a suit and the suit is then served on the line, the line refers it back to its underwriters, the underwriters notify the adjusting company or the claims department that if this matter can't be gotten rid of, to refer it out to defense lawyers.

That's where a firm like ours comes into the picture. Suits are sent out for defense.

There are occasions when claims adjusters are able to settle a suit, but it is not very often, and there are occasions where very large claims are sent out to lawyers by the reason of the size of the claim or because of the complexity of the claim and so there are times, not very often, when a lawyer may handle a claim which is not in litigation.

(215a-217a)

Mr. DeOrchis further explained that the parties to the release only intended to release claims, not lawsuits:

Q. Referring to page 2 of the release, the description, what did you intend by the language "and any other cargo claims filed against Barber Steamship Lines"?

A. We are talking about the indented paragraph?

Q. Yes, sir.

A. That's something Mrs. O'Keefe—it turned out to be indented like that—that's what she wanted in the release and this she wanted when Barber Lines came up with those four or five additional claims from their office, and she said she wanted no more claims coming out of that—coming out of the woodwork was the way she put it.

So, we agreed on this language. She initiated it but I agreed to it, and the language specifically refers to claims.

Now, if you look at the previous page, when we are talking about what we are not going to do to Barber Lines after we sign this release, you will find the usual language in a release which says that we are going to release Barber Lines from all "actions, causes of actions, suits, debts, controversies, agreements, judgments, claims."

The Court: It says you are going to release and discharge Pittston, not Barber Lines.

The Court:* I'm sorry, that was a mistake on my part.

Barber Line was going to release Pittston. That's the usual language, actions, causes of actions, suits and so on.

Finally you get down to claims. *The subject matter of this release was not actions, causes of actions, suits, claims. It was simply claims, and defined by the fact that we have a list of claims, and she says —we said, "Any other cargo claims filed against Barber Steamship Lines."*

So, we are talking about this type of animal which is on the list or any others like that, but we are not talking about lawsuits and in fact I would not have spoken to her about any lawsuit because she is not a lawyer, and lawsuits, I would be dealing with whoever the lawyers were for Pittston.

* * * * *

* Should read A, not The Court.

> Q. Did the parties intend when, they signed this release, Exhibit No. 1, to release the lawsuit now before the Court.
>
> A. No.

(225a-226a, 227a) (emphasis supplied).

The above conclusion has not been rebutted even though Pittston's present claims manager was present in the Courtroom,

> *By Mr. Warner*:
>
> Q. Within the last two or three weeks have you settled with Mr. Catrell (should read Cotrell) of Pittston, who is sitting in the jury box . . .

(230a)

and even though Pittston's claims manager at the time the release was signed, Miss O'Keefe, had testified before trial, and the deposition transcript was available.

The district court noted that Pittston failed to call witnesses to rebut the evidence, introduced by Barber, concerning the intent of the release. It correctly concluded that there was no doubt that the release (277a-283a) did not release Pittston from liability for the action now before the bar:

> It may be noted that Pittston's failure to call witnesses —Miss O'Keefe, for one—to counter such evidence provides at least some added grace to the posture assumed by third-party plaintiffs. This is not to overlook Pittston's contention that the inference thus drawn is improper where, as here, the potential witness is equally available to both parties. But see *United*

> *States* v. *Erb,* 543 F.2d 438, 444 (2d Cir. 1976), and cases cited therein. Nor does this Court ignore Pittston's assertion that, under a familiar principle of contract construction, the release must be construed most strictly against the party that drafted it. Nevertheless, this Court concludes, the application of that rule to resolve ambiguities that remain after resort to extrinsic evidence has proved unavailing, see *Boswell* v. *Chapel,* 298 F.2d 502, 506 (10th Cir. 1961), and cases cited therein, is inappropriate here: *the evidence described above leaves the Court, unhappily for Pittston, with no doubt as to the intended meaning of the release.*

(263a-264a) (emphasis supplied)

Pittston argues that Barber's, and the district court's, interpretation of the release is in error because one of the claims on the original list of claims settled, number 50, Exhibit 1 at 283a, was a lawsuit at the time the release was signed. The simple answer to this argument is that neither Miss O'Keefe, who brought the case in her file to Mr. DeOrchis, nor Mr. DeOrchis realized that particular matter was a suit at the time. It was inadvertently discussed (228a-230a).

In fact, if law suits were to be discussed, and the release was intended to include law suits, an exhibit introduced by Pittston, Exhibit 35 (371a-372a), never would have been written. There would have been no need for the client to alert Mr. DeOrchis that he had recommended settlement of a lawsuit which the client had not given him to settle, if the parties had intended Mr. DeOrchis, Mr. Shimshidian and Miss O'Keefe to settle law suits.

The parties to the release only intended to release claims, not lawsuits. The district court heard the testimony of Mr. DeOrchis and Mr. Shimshidian, and correctly concluded that the release, which disposed of over 50 claims for about $45,000, did not include this $45,000 lawsuit.

POINT I

Even the "action or inaction" attributed to Barber by Pittston would not preclude Barber from relying upon the warranty of workmanlike service which Pittston owed to Barber.

As explained at pages 3 through 11 *supra,* Barber did not, through its "action or inaction" prevent Pittston from performing its warranty. However, even if Pittston's factual allegations were correct, they would not preclude Barber's reliance upon Pittston's warranty.

Pittston correctly referred, at page 12 of its brief to *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.,* 355 U.S. 563, 567 (1958); *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.,* 508 F.2d 437 (2d Cir. 1974); *Hurdich* v. *Eastmount Shipping Corp.,* 503 F.2d 397 (2d Cir. 1974); *Henry* v. *A/S Ocean,* 512 F.2d 401 (2d Cir. 1975); *Waterman Steamship Corp.* v. *David,* 353 F.2d 660 (5th Cir. 1965), cert. denied, 384 U.S. 972, as the determinative case law on the point. All these cases, with the exception of *Conceicao* v. *New Jersey Export Marine Carpenters, Inc., supra,* held that the shipowner's action *did not* preclude the shipowner from relying upon the stevedore's warranty of workmanlike service.

Pittston's argument that Barber's failure to inform Pittston of Pittston's own mistake, can be disposed of

by examining this Court's decision in *Henry* v. *A/S Ocean,* 512 F.2d 401 (2d Cir. 1975). Pittston conceded that it erred, but claims that Barber should have notified Pittston of its own error, before Pittston further erred and lost the coffee in suit. In *Henry* v. *A/S Ocean, supra,* the Court held that not only did the shipowner err, but that its error constituted negligence. The Court also noted that the stevedore was partly to blame for the accident. The Court correctly concluded that the stevedore's fault amounted to a breach of the implied warranty of workmanlike service, contained in the agreement between the stevedore and shipowner. The shipowner's negligence did not prevent the stevedore from performing the warranty. Thus, the stevedore was found solely liable. *Henry* involved personal injury claims by two longshoremen. They were both injured due to negligence of A/S Ocean, the owner of the vessel upon which they were injured and the fault of the stevedore employer.[1] The longshoremen were working on top of a pontoon rack, at a height of 11 feet above the vessel's main deck and 60 feet above the water. There was no safety netting around the pontoon rack. In addition to this dangerous position, the vessel's winch had malfunctioned. The vessel's mate told the longshoremen not to reposition a boom themselves. He promised to have the vessel's crew reposition it. When the crew did not appear within 15 minutes to reposition the boom, the longshoremen attempted to continue working without repositioning the boom and were injured. Although the jury held that the vessel was negligent, the Second Circuit correctly affirmed a complete indemnity award in favor of the vessel owner against the stevedore.

---

[1] The accident with which the *Henry* v. *A/S Ocean, supra* court was involved, occured before the 1972 amendments to the Longshore and Harbor Worker's Act, 33 U.S.C. §901.

The following explanation by the Court also disposes of Pittston's arguments in our situation:

> " . . . [T]he shipowner's negligence does not necessarily preclude it from recovering indemnity against the stevedore. . . . (Citations omitted) As the Supreme Court stated in Italia Soc. v. Ore. Stevedoring Co., 376 U.S. at 321, 84 S.Ct. at 752 (1964):
>
> "[R]ecovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and stevedore and is not necessarily affected or defeated by the shipowner's negligence, whether active or passive, primary or secondary. Weyerhaeuser S.S. Co. v. Nacirema Operating Co., *supra.*"
>
> The shipowner's own conduct will preclude it from obtaining indemnity from the stevedore only where it prevented or seriously handicapped the stevedore in his effort to perform his duties. 'Merely concurrent fault is not enough,' Albanese v. N.V. Nederl. Amerik. Stoom.-Maats, 346 F.2d at 484, citing Misurella v. Isthmian Lines, 328 F.2d 40 (2d Cir. 1964), and *Weyerhaeuser S.S. Co., supra.*
>
> Applying these principles to the present case, there was ample evidence to support the conclusion that Pittston's conduct was responsible for the plaintiff's accident and that Pittston was not prevented by the shipowner from rendering safe and workmanlike service that would have avoided the accident, even though the shipowner was negligent. Although the shipowner may have failed to respot the boom, it was the stevedore's foreman who, instead of waiting for the shipowner to do so, gave the order to remove the lashings

> draft while the boom remained in the incorrect position. Similarly, while the shipowner may have permitted the use of a dangerous method of unloading the lashings, Pittston took no action to stop its employees from working atop the pontoons or to supply a safety line.[4] Since the stevedore was in a position to avert the injuries, the jury was entitled to find that Pittston's actions did not constitute reasonable performance of its warranty."

Henry v. *A/S Ocean, supra,* 512 F.2d at 407.

In our situation, Pittston concedes that it made the first mistake, delivering the wrong cargo to plaintiff. It was, therefore, in the best position to prevent the loss. The district court was entitled to find that Pittston's action did not constitute reasonable performance of its warranty. Pittston tries to pass the blame to Barber by claiming that Barber should have stopped Pittston from making further mistakes. Barber bought the warranty from Pittston, not vice versa. Therefore, Pittston should bear the loss.

In *Hurdich* v. *Eastmount Shipping Corp., supra,* Judge Waterman ruled that the issue of whether a shipowner has precluded itself from relying on a warranty is an issue of fact.

> Thus a shipowner can by its own conduct foreclose its right to indemnity, *and in any particular case the determination of whether the shipowner has so precluded itself is an issue of fact.*

Hurdich v. *Eastmount Shipping Corp., supra,* 503 F.2d at 401 (emphasis supplied).

Therefore, the district court's correct finding that Barber did not preclude itself from relying upon Pittston's

warranty was a finding of fact which can only be overturned if clearly erroneous, *McAllister* v. *United States*, 348 U.S. 19 (1954).

The district court's finding is not, only not clearly erroneous, it is correct. The district court's finding should be affirmed.

The finding of the court in *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F.2d 437 (2d Cir. 1974) is easily distinguished from our situation. *Conceicao, supra,* concerned a longshoreman's suit against the shipowner for injuries suffered when a pipe loaded on board the vessel, dislodged, and struck the longshoreman. *The jury determined that the proximate cause of the accident was the shipowner's improper instructions given to the stevedore.*

The shipowner ordered the stevedore to build two racks to hold a shipment of pipe, when it should have ordered the stevedore to build three racks. When the longshoremen tried to fit the pipe, which would have filled three racks, into two racks, a pipe fell and injured the plaintiff.

Conceicao is readily distinguished from the case at bar. In *Conceicao* the shipowner's actions *preceded* the stevedore's action and were responsible for the dangerous condition that ensued. In the case at bar, the actions alleged to have been committed by the shipowner *followed* the actions of the stevedore and therefore could not be found to be the proximate cause of the resulting condition.

In *Conceicao,* the jury found, *as a finding of fact,* that the shipowner's negligence was the proximate cause of the accident, and that the negligence precluded the shipowner from relying upon the stevedore's warranty.

The appellate court did not alter this finding of fact. Similarly the district court's finding of fact that Barber did not preclude itself from relying upon Pittston's warranty, should not be disturbed.

POINT II

The District Court was correct in concluding that Barber's lawsuit with plaintiff was not a claim encompassed within the release executed by Barber, in favor of Pittston, on November 13, 1972.

The district court permitted the introduction of parol evidence to explain the meaning of the following paragraph which was inserted in the release at page 2 (278a):

> any damage or loss to the shipments of cargo included in the attached list, marked "Exhibit A", and any other cargo claims filed against Barber Steamship Lines, Inc., Barber Lines, A/S, Wilh Wilhelmsen, Fearnley & Eager, Klaveness, A.F. & Co., A/S up to November 13, 1972

After examining the unrebutted parol evidence, the District Court agreed with Barber's interpretation of the release, and correctly concluded that the release did not release Pittston from the liability which arose from the matter now before the bar. Both the district court's receipt of parol evidence and its interpretation of the parol, and written, evidence was correct.

Pittston made only perfunctory objection to the receipt of parol evidence at the time of trial.

> Mr. Warner: If it pleases the Court, out of abundance of caution may I object on the ground the release

was prepared by their counsel, signed by their counsel.

It is plain, clear, unambiguous (197a).

The admission into evidence of the parol evidence was correct, and was in the spirit of this Court's decision in *Estate of Anton L. Trunck* v. *Commissioner of Internal Revenue,* Docket No. 76-4125, slip opinion 1651, 1657 (2d Cir. February 2, 1977):

> The days when wooden application of the parol evidence rule was allowed to produce results contrary to the parties' intention having long since passed.

Pittston now urges the Court, woodenly to turn its head away from the parol evidence and somehow to reach a contrary conclusion. Such action would be contrary to the current thread of reasoning in parol evidence cases and contrary to the intent of the parties to the release.

In fact, the rejection of parol evidence would also be contrary to the arguments set forth at page 21, *et seq.* of Pittston's brief. Pittston's arguments against receipt of parol evidence were greatly reduced, if not destroyed, by Pittston's argument, at page 21, *et seq.*, of its brief, that mutuality of knowledge of the intended meaning of words used in a release must be had and exhibited before a court will give legal effect to those words. Instead of reinforcing its initial objections to the court's admission of parol evidence to interpret the release, Pittston endorses the trial court's view that the court is entitled to be advised of all the surrounding circumstances to enable it to determine the intended common usage which the parties attached to the terms "claim" and "lawsuit".

By citing *United States* v. *Lennox Metal Manufacturing Co.*, 225 F.2d 302 (2d Cir. 1955) for the proposition that the requirement of mutuality of knowledge is essential to interpret the release, Pittston acknowledges that there is sufficient ambiguity in the use of the terms by the parties so as to allow parol evidence.

In any event, the district court properly interpreted and applied the parol evidence rule.

The district court explained that the:

> . . . parol evidence rule's prohibition is by no means unbounded. Indeed, as this Circuit long ago observed "that rule does not exclude evidence to interpret, explain, or clarify (rather than contradict) that written document" * * *

Rotberg v. *Dodwell & Co.*, 152 F.2d 100, 101 (2d Cir. 1945). See *Estate of Anton L. Trunk* v. *Commissioner of Internal Revenue*, Docket No. 76-4125 at 1657-58 (2d Cir. February 2, 1977). And "the terms of any contract must be given a meaning by interpretation before it can be determined whether an attempt is being made to 'vary or contradict' them." *United States* v. *Lennox Metal Manufacturing Co.*, 225 F.2d 302, 314 (2d Cir. 1955). Accordingly,

> "'In determining whether the * * * parties gave the same meaning to their express words and what that meaning was, or in determining whether one party gave a particular meaning to the words and the other knew or had reason to know that he did, * * * the court should be advised of all the surrounding circumstances; of the meaning that is given the language of the agreement by common usage, by usage in the trade

> or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other.'" *United States* v. *Lennox Metal Manufacturing Co., supra,* at 314, *quoting* 3 Corbin, Contracts 45 (1951). (261a)

Pittston also, relied upon the portion of the above quote, at page 22 of its brief. It argued that the *usage in the trade, business or profession of the parties to the release* treated the terms *claim and lawsuit* interchangeably. The evidence introduced at trial is otherwise.

The only evidence on this issue came from the testimony of Mr. DeOrchis (215a-218a) and Mr. Shimshidian (208a-209a). They explained that the terms are *not* used interchangeably in the maritime insurance and adjusting fields. They define two separate and distinct matters. Please see pages 15-18, *supra* for the explanation, given by Mr. DeOrchis, of the two terms.

Judge Conner had the opportunity to observe the demeanor of Mr. DeOrchis and Mr. Shimshidian as they testified and he believed their testimony. Pittston offered no testimony or other evidence to rebut Messrs. DeOrchis' and Shimshidian's testimony even though Judge Conner specifically offered Pittston the opportunity to do so.

> Let me say, Mr. Warner, if you got somebody who wants to come in and give his version of the negotiations if you can get him up here this afternoon, we will hear him too. (196a)

* * * * *

> The Court: Mr. Warner, are you going to have any witnesses on this matter? (236a)

Pittston is now attempting to argue that the terms *claim* and *lawsuit* are interchangeable in the maritime insurance and adjusting fields without introducing any evidence to support the argument.

The district court's finding of fact on this issue is the correct interpretation of the evidence. Pittston cannot now argue that the lower court was clearly erroneous pursuant to the test set forth in *McAllister* v. *United States,* 348 U.S. 19 (1954).

An examination of some of the cases cited by Pittston reveals that the cases support Barber's arguments, not Pittston's argument.

Pittston relied upon *Rotberg* v. *Dodwell & Co.,* 152 F.2d 100 (2nd Cir. 1945) at page 21 of its brief for the proposition that a release could include future and contingent claims. However, that Court limited a release's effect upon *contingent and future claims* to those instances " . . . when the intent of the parties *to that effect is clear.*" *Rotberg* v. *Dodwell & Co., supra,* 152 F.2d at 101. In other words, the Court felt bound to examine the parties' intent to release future and contingent claims more carefully than the parties' intent to release past and certain claims. In *Dodwell, supra,* the Court was asked to bar a claim, which at the time the release was executed, was contingent and future. Therefore, the Court accepted parol evidence on the issue.

In *Dodwell, supra,* only one of the parties to the release, the defendant, introduced evidence of the parties' intent.

The Court accepted that interpretation and granted defendant summary judgment.

Similarly, in the case now before the bar, only one side, Barber, introduced evidence of the parties' intent and the Court accepted Barber's interpretation. The following language from *Dodwell* can well be applied to our situation:

> Plaintiffs made no suggestion of further evidence available or request for adjournment, and are not in a position to object now to the disposition of the case on a construction of the release.

Rotberg v. *Dodwell & Co., supra,* 152 F.2d at 101

Pittston's arguments that duress, illegality, fraud or mutual mistake must be established before a release can be voided are irrelevant. Barber did not ask the district court to void the release, nor did the district court void the release. It simply and correctly interpreted the intent of the parties to the release, and held that they wished to release matters in the *claim* stage, as of November 13, 1973, not matters which had become *lawsuits* by November 13, 1972.

Barber argued, and the district court held, that the meaning of the release, as explained by its wording and the parol evidence was clear. The release released non-litigated claims only, not lawsuits. It did not release the matter now before the bar. Parol evidence was properly received and the Court correctly held, *as a finding of fact,* that the release did not include the lawsuit now before the bar.

CONCLUSION

The judgment of the Court below should be affirmed.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for S.S. Toronto, etc., Wilh Wilhelmsen, Barber Steamship Lines, Inc. and Barber Lines A/S

CHESTER D. HOOPER
VINCENT M. DEORCHIS
of Counsel

3 COPY RECEIVED
SYMMERS, FISH & WARNER
JUL 29 3 13 PM '77

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775